Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

ANTHONY GUEST,

Petitioner,

v.

TERRY McCANN, Warden,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in failing to determine if the trial judge in Cook County, Illinois was presumed biased (independent of the issue of being actually biased) while he presided over petitioner's capital murder case, in violation of petitioner's due process rights under the Fourteenth Amendment, based on the judge's interest in the outcome of petitioner's trial in June 1983 -- a bench trial — when the judge then knew that he was under investigation for past judicially-corrupt leniency.

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* *Mr. Halpern's application for admission to the Bar of the Court is pending. Ms. Goldman has been admitted to the Bar of the Court.*

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Anthony Guest requests this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit, denying him *habeas* relief.

OPINIONS BELOW

The Opinion of the Seventh Circuit is reported at 474 F.3d 926 and is reprinted at App., 1a–12a. The Seventh Circuit's Order denying rehearing is found at App., 13a-14a. The Opinion of the District Court for the Northern District of Illinois, Eastern Division is unreported and a copy of the Memorandum Opinion and Order is found at App. 15a-32a. The Illinois Supreme Court's 1995 Opinion denying *habeas* relief is reported at 655 N.E.2d 873.

JURISDICTION

The judgment of the Seventh Circuit was entered on January 18, 2007. On March 12, 2007, a timely petition for rehearing *en banc* was denied. This petition is being filed on or before June 11, 2007. Therefore, this Court has jurisdiction under 28 U.S.C. § 1254(1).

This petition states two grounds for *certiorari*:

> (1) the Seventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this court; and (2) the Seventh Circuit has entered a decision in conflict with the decisions of other United States courts of appeals on the same important matter and has decided an important federal question in a way that conflicts with a decision by a state court of last resort.

See Rule 10(a) & (c) of the Supreme Court Rules.

In denying Guest's petition for a writ of *habeas corpus* based exclusively on its finding of an absence of actual bias, the Seventh Circuit misapplied this Court's well-established precedent in judicial bias cases. Moreover, the Seventh Circuit has misapprehended the limitations of *Bracy v. Gramley*, 520 U.S. 899 (1997), and the appropriate standard for cases involving

the judicial appearance of bias, placing it at odds with the decisions in other Circuit courts of appeals and the Illinois Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

This case implicates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Summary of Procedural History

Following a three-day bench trial in June 1983, Judge Maurice Pompey of Cook County Criminal Court in Illinois convicted Anthony Guest of murder and other charges and, a month later, sentenced him to death by electrocution. (S. App. 168, 216-17.)[1] The Illinois Supreme Court affirmed Guest's conviction and sentence but vacated the conviction on two less serious murder charges. *People v. Guest*, 503 N.E.2d 255 (Ill. 1986). After a petition for rehearing was denied, Guest unsuccessfully sought certiorari to the Supreme Court of Illinois in this Court.

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1. "S. App." [page number] refers to the appendix that was filed with the United States Court of Appeals for the Seventh Circuit. "R." refers to the record on appeal. "App." refers to the accompanying Appendix.

Guest filed a post-conviction petition for relief in the Illinois trial court based primarily on claims of ineffective assistance of counsel, which was denied in March 1992, without an evidentiary hearing. In May 1995, the Illinois Supreme Court affirmed the dismissal without a hearing. *People v. Guest*, 655 N.E.2d 873 (Ill. 1995). After a petition for rehearing was denied, Guest unsuccessfully sought certiorari to the Illinois Supreme Court of Illinois in this Court. *Guest v. Illinois*, 516 U.S. 1176 (1996).

In April 1997, the Illinois Supreme Court entered an Order staying Guest's execution pending resolution of his petition for a writ of habeas corpus. Guest filed his petition that month in the United States District Court for the Northern District of Illinois and amended it in September 1998. In addition to claims concerning his death sentence, Guest asserted that: (i) he had been denied his right to a fair trial before an impartial judge; and (ii) he had received ineffective assistance of counsel. Guest's *habeas* claim that his due process right to a fair trial was violated because of judicial bias followed the federal corruption trial — and conviction — of Cook County Judge Thomas Maloney in March 1993, during which extensive evidence of Judge Pompey's judicial corruption surfaced.

In September 1997, the District Court granted Guest's motion for discovery on the issue of judicial bias in his case. The District Court's discovery order followed this Court's authorization of discovery in another Seventh Circuit judicial bias case. *See Bracy*, 520 U.S. 899.

On January 11, 2003, then-Governor George Ryan granted Guest clemency and removed the penalty of death as a possible legal consequence of his offense. As a result of the clemency order, Guest's death penalty claims in his *habeas* petition were mooted.

In his amended *habeas* petition, as later supplemented, Guest asserted that: (i) he was denied his right to a fair trial because his trial was held before a corrupt and biased judge;

and (ii) his trial counsel provided ineffective assistance. In March 2004, Guest's *habeas* petition was denied, but the District Court took note of the wealth of compelling evidence of Judge Pompey's corruption. The District Court determined, first, that the evidence of Pompey's corruption had rebutted the presumption that public officials have properly discharged their official duties. *Guest v. Page*, 2004 U.S. Dist. Lexis 4678, *18 (N.D. Ill. March 22, 2004). The evidence that the District Court identified included "numerous witnesses with first-hand knowledge [who] testified that Judge Pompey routinely accepted bribes and fixed cases" and the "alarming" testimony that Judge Pompey's personal bailiff, Lucius Robinson, "[had] passed bribes to the judge on hundreds of occasions." *Id.* at *19. In sum, the District Court recognized that "Guest's counsel [had] unearthed a considerable amount of distressing evidence that casts serious doubt on Judge Pompey's integrity." *Id.* at *18.

In March 2005, the Seventh Circuit granted a certificate of appealability on the issue whether Guest was denied his constitutional right to an impartial trial judge. (S. App. 1.)

In his appeal to the Seventh Circuit, Guest argued that, because Judge Pompey had long orchestrated an extensive courthouse bribery scheme and was aware that he was under investigation at the time of Guest's capital murder trial, he had a substantial – and disqualifying — interest in the outcome of Guest's trial proceedings, his interest constituted presumptive bias, in violation of the Due Process Clause, he was constitutionally barred him from presiding over Guest's case and the judgment in the case should be vacated. (Guest also argued, separately, that Judge Guest's actual bias was demonstrated through his judicial rulings and other conduct at Guest's trial.)[2]

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2. As the evidence of his historical corruption made clear, part of Judge Pompey's *modus operandi* was for the defendant in Judge Pompey's courtroom to waive a jury trial in favor of Judge Pompey's presiding as both judge and jury.

On January 18, 2007, the Seventh Circuit affirmed the District Court's judgment denying Guest's habeas petition. The Seventh Circuit held that Guest's examples of Judge Pompey's trial rulings and other conduct did not demonstrate "actual bias." The panel failed to consider, however, Guest's fundamental due process claim that Judge Pompey held "an interest in the outcome of this trial proceedings" and therefore was presumptively biased and should have been barred from presiding over Guest's trial. *See Guest v. McCann*, 474 F.3d 926, 933 (7th Cir. 2007). Guest argued that, independent of actual bias, Judge Pompey was presumed biased because of a temptation to divert the glare of the FBI's attention away from himself while he was presiding over Guest's capital murder case. Unlike the issue of actual bias, no mention is made in the Seventh Circuit's opinion of Guest's argument on presumed bias.

Guest timely filed a petition for rehearing *en banc* on the ground that the Seventh Circuit panel failed to address its due process claim, and the Seventh Circuit subsequently denied the petition in a summary Order, on March 12, 2007.

This petition for writ of certiorari follows.

II. Factual Background

A. Nature and Scope of the Evidence Against Judge Pompey

The evidence demonstrates that, by the time Anthony Guest appeared for a bench trial before Judge Pompey on capital murder charges, in June 1983, Judge Pompey was well aware of his roles in two related areas of heightened personal concern: (i) an orchestrator and principal beneficiary of a longstanding judicial bribery in the Cook County, Illinois court system; and (ii) a subject of the FBI's investigation of judicial corruption in Cook County. The evidence of Judge Pompey's corruption arose from a multi-year FBI investigation of judicial corruption in Cook County, which became known as Operation Greylord. The FBI investigation generated indictments against 92 officials,

nearly all of whom were convicted, including 17 judges, 48 lawyers, 8 policemen, 10 deputy sheriffs, 8 court officials and one state legislator. Bribe payments routinely were exchanged in courthouse bathrooms, elevators, jury rooms, hallways and stairwells. (S. App. 266A.) Case-fixing was so blatant and widespread that it was not uncommon for attorneys to stuff cash-filled envelopes into judges' mailboxes.

The evidence of Judge Pompey's corruption principally came to light at the federal racketeering and corruption trial of another Cook County Judge, Thomas Maloney, nearly 10 years after Judge Pompey resigned from the bench, in December 1983. *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995). Maloney was convicted of racketeering, conspiracy, extortion and obstruction of justice. *Id.* However, Judge Pompey was never prosecuted. (S. App. 276, 233, 367.)[3]

Nonetheless, the extensive evidence of Pompey's judicial corruption that ultimately surfaced was compelling and adduced in multiple forms, from several independent sources: testimony of multiple witnesses at the Maloney trial, including Judge Pompey's long-serving former deputy, Lucius Robinson; an undercover FBI agent, Terrence Hake; undercover audiotape recordings of corrupt dealings about a case before Judge Pompey; deposition testimony of Robinson, Hake, Pompey and several defense lawyers; and FBI investigative and interview reports.

Robinson testified about the scope, duration and details of his bribery scheme with Judge Pompey, in which Pompey dismissed criminal cases in exchange for cash bribe payments.

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3. But this Court would become aware of Judge Pompey's corruption. The Seventh Circuit stated: "Indeed, in *Bracy v. Gramley*, the United States Supreme Court took note of the evidence against Judge Pompey that surfaced in the investigation of Judge Maloney." 520 U.S. at 907 n.7 ("The Government introduced evidence that Maloney regularly bribed Judge Maurice Pompey and Cook County Deputy Sheriff Lucius Robinson (who would later serve as Maloney's 'bag man')"). *Guest*, 474 F.3d at 932 n.1.

Hake testified about his corrupt conversations with Robinson concerning payoffs for Judge Pompey in exchange for Pompey's dismissing a criminal case Agent assigned to his docket (as part of an undercover sting operation). Hake's testimony at Maloney's trial was supported by audiotape recordings. (*See* S. App. 288-312.)

B. Judge Pompey's Historical Corruption

From the early 1970s until 1983, Judge Pompey operated a corrupt enterprise in the Cook County, Illinois Courthouse in which he accepted cash payoffs in exchange for acquittals, dismissals and other lenient judicial dispositions, from preliminary hearings to felony murder trials. Lucius Robinson, Judge Pompey's personal deputy between 1971 and 1983, testified that "hundreds" of defense lawyers approached Robinson and asked him for "help" on their cases before Judge Pompey and other Cook County judges, in exchange for cash bribes. (S. App. 284, 304, 306-07, 315-16, 332-33, 336; *see also* 417-18, 421-31, 434-36.) Robinson and Judge Pompey together would review the crooked cases and their illegal arrangements, including the amount of the bribe.

Robinson would then inform the defendant's lawyer of the specifics of the deal. Robinson testified that he repeatedly had served as Judge Pompey's "bagman," accepting large sums of cash for the judge from lawyers who paid for the judge's fix, from $500 to $3,500 each, depending on the case. (S. App. 308.) Typically, Robinson would receive the cash payoff in a newspaper or envelope and then hand it over to Judge Pompey. (S. App. 337, 340.) The bribery in Judge Pompey's courtroom was so rampant that court dispositions became a standing joke. Cases that appeared to be dismissed for no legitimate reason were termed dismissals on "motion Lucius," as dubious homage to the role that Judge Pompey's deputy played in the judge's corrupted courtroom. (S. App. 393-95.)

Judge Pompey's inveterate corruption had early origins. The Government had introduced evidence at Maloney's trial that, before he became a judge, Maloney as defense lawyer routinely

bribed Judge Pompey. *Bracy*, 520 U.S. at 906 n.7. Evidence at other Operation Greylord trials and interviews with the FBI established that several defense lawyers and former judges also made payments to Robinson to pass along to Judge Pompey to fix their clients' cases. (S. App. 256H-J, 278, 283-312, 369, 371, 345-54.)

C. Pompey's Judicial Corruption Leading Up to and Around Guest's Trial

Judge Pompey continued to fix felony cases, until the summer of 1983, including at least one notorious murder trial. (S. App. 312, 258-67; *see generally* R. 64, Ex. G (excerpts in S. App. 250-71.)) In August 1982, Pompey presided over *State v. Farmer*, a highly-publicized homicide case in which the defendant was tried for torturing and murdering a drug dealer suspected of being a government informant. Judge Pompey acquitted the defendant, notwithstanding the eyewitness testimony that Farmer stabbed and then shot the victim in the head as he pleaded for his life. (S. App. 270.) Judge Pompey defended his verdict with a summary conclusion: the State had not met its burden "based on the totality of the evidence[.]" *Id.*

Both before and after the *Farmer* case, Judge Pompey's record on felony drug cases for the two years before Guest's trial was particularly noteworthy to the FBI. In 13 felony Class X narcotics cases before Judge Pompey on motion or bench trial between 1981 and 1983, none resulted in a conviction of the most serious charge. (S. App. 258-67; *see generally* R. 64, Ex. G. (excerpts in S. App. 250-71.)) Six cases resulted in outright findings of not guilty; three in *nolles prosequi* after suppression motions; and four of the cases ended with guilty pleas to lesser included offenses. *Id.* Five of the six cases that resulted in findings of not guilty involved the same defense lawyer, who later pled guilty to bribing Judge Pompey and other judges. (*Id.*; S. App. 270.)

Pompey's operation was also captured on audiotape recordings, as part of Operation Greylord. As noted, former FBI

Agent Hake testified about the extensive corrupt dealings — mostly recorded – that he had between October 1982 and August 1983 with Judge Pompey's deputy while posing in his undercover role as a corrupt defense attorney. In particular, Hake testified about an undercover case assigned to Judge Pompey, *People v. Torrez*, which he had fixed by bribing Robinson and Pompey. After Hake made one of the cash payments to Robinson in a handshake, Robinson assured him that he would "see that [Pompey] gets it." Robinson made clear that Judge Pompey hewed closely to his own system for fixing cases on his docket: "[w]e have a way of doing things."[4] (S. App. 301.) Robinson also warned Hake that it would be difficult to fix a case if he waited until it "hit the priority list," which reflected old cases slated for disposition or trial. (S. App. 299-300.) Hake made a total of $1,300 in bribe payments for Pompey to dismiss *Torrez* — $1,000 for Pompey and $300 for Robinson (S. App. 308.) — and thereafter, in March 1983, Pompey made good on his part of the bargain. (*See, e.g.*, S. App. 290, 310-11.)

Pompey's corruption scheme even continued surreptitiously after the start of Guest's case. On June 7, 1983, the day after Guest's bench trial began, Hake held an audio-recorded meeting with Robinson behind Pompey's courtroom (S. App. 288-312) and, later that same day, Robinson asked Hake for the names of the judges who were assigned his cases and offered his help in trying to fix cases with "[t]wo or three [judges] here in this building." (S. App. 312.)

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4. Indeed, a critical element of the Pompey-Robinson corruption scheme was to have defendants waive their right to a jury trial in order to enable Pompey to exercise greater control over their cases. Robinson testified at Maloney's trial that he would advise defendants, based on his experience with Judge Pompey, to proceed with a bench trial. (S. App. 439; *see also* 248-49.) Consistent with the practice in Judge Pompey's courtroom, and after last-minute holding cell encounters with Robinson and a Pompey bailiff, Guest ultimately agreed to waive his fundamental right to have his capital murder case tried by a jury and to have Judge Pompey decide his fate instead. (S. App. 5.)

D. Judge Pompey's Knowledge That He Was Under Investigation

In June 1983, around the time of Guest's trial, and even earlier, Judge Pompey well understood that he was under investigation for his judicial corruption. (*See, e.g.*, R. 152, Ex. 2, 37-42, 54, 79-80.) Specifically, Pompey's longstanding record of extraordinary leniency was under FBI scrutiny. The signs of an investigation were obvious to anyone who had anything to do with Judge Pompey's courthouse. By the time that Guest's capital murder case neared trial, virtually the entire Cook County courthouse was aware of the FBI's investigation. Court files were seized throughout the building. (S. App. 402.) "There was noise in the [courthouse] building that . . . files were being seized all over the place." (S. App. 402.) Indeed, for about the six months leading up to the announcement of the investigation in August 1983, "[s]omebody knew something was afoot in the building." (S. App. 402-03.) That an investigation was underway even earlier than May or June of 1983, was considered entirely likely, and by summer "rumors abounded that there was a massive investigation." (S. App. 406-08.) "People started quitting, disappearing" or "complaining that they were being . . . interrogated. Those kind[s] of rumors were afoot in the building." *Id.*

Investigators were questioning individuals associated with what were referred to as "suspect courtrooms," and "Pompey would have been one of the persons that talk was going about." (S. App. 409.) Guest's trial lawyer testified that, around the time of the Guest trial, he had heard that investigators wanted to interview Robinson. (S. App 403.) According to Guest's trial lawyer, the heat was on "a couple of judges including Pompey;" Pompey himself was aware of the talk. (S. App. 403, 407-09.) As "an intelligent man," Pompey was understood to have heard the talk. (S. App. 409.) It was also clear that Pompey and Robinson had discussed the existence of an investigation before it was announced, and their conversation on the

subject continued after Operation Greylord became public. (*See, e.g.*, R, 152, Ex. 2, 37-42, 54, 79-80.)

Evidence of the FBI's investigation was so clear in the spring of 1983 that it was obvious even to courthouse outsiders. In early May 1983, an indicted defendant advised the authorities that she was aware that certain lawyers and judges in Cook County were under criminal investigation. *See People v. Friedman*, 494 N.E.2d 760 (Ill. 1986). On August 6, 1983, the Operation Greylord investigation was publicly announced. Media reports followed that Judge Pompey was under investigation. (S. App. 279-82.)

In early December 1983, Judge Pompey announced his resignation from the bench. (S. App. 273-74.) His announcement followed a defense motion that challenged Pompey's guilty verdict in a narcotics case, suggesting that Pompey had been influenced by news reports that he was being investigated under Operation Greylord for his past excessive leniency. (S. App. 273.) Judge Pompey personally acknowledged his awareness of a television news report that he was a target of the FBI's Operation Greylord investigation. (S. App. 273-274.)

E. Guest's Trial, Verdict and Sentencing

On June 6, 1983, after separate off-the-record encounters with Judge Pompey's bailiff and others, in his holding cell, Guest ultimately agreed to waive his right to have a jury decide both his verdict and his sentence in his capital murder case and proceed before Judge Pompey only.[5] Judge Pompey asked Guest

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5. One bailiff who stopped by Guest's holding cell assured Guest that "Judge Pompey would be fairer than a jury." Lucius Robinson also stopped by the holding cell to help persuade Guest to waive a jury trial. With Guest's lawyer there too, Robinson told Guest that he worked for Judge Pompey and that he "knew [Pompey] to be a good, fair judge." While Guest remained unpersuaded, Robinson attempted to assure Guest that he "was acting in [Guest's] best interest." To bolster his position, Robinson also told Guest that "he had worked as a bodyguard for

(Cont'd)

a couple of questions about his waiver and confirmed that he had signed the waiver form, but engaged in no substantive colloquy to determine if, in this capital murder case, Guest's waiver of a fundamental constitutional right was knowing, voluntary and intelligent. As a result of the waiver, Judge Pompey personally would constitute the jury at trial and, similarly, he alone would consider the sentencing factors and determine whether to sentence him to die. After three trial days, two live witness and several stipulations, on June 13, 1983, Judge Pompey returned a guilty verdict on charges of intentional, knowing and felony murder, attempted murder, aggravated battery and two counts of unlawful weapons use. Over objections from Guest's lawyer, Judge Pompey refused to provide any specific findings in this capital murder case.

On July 6, 1983, after a brief hearing and four weeks from verdict, Judge Pompey sentenced Guest to death by electrocution.[6]

Just four months after Operation Greylord was made public, Judge Pompey announced his resignation from the bench. (S. App. 279-82.)

(Cont'd)

Mohammed Ali and would not steer a brother in the wrong direction." Guest, at the time, "valued [Robinson's] opinion because [he] felt [Robinson's] connection to the black community made him trustworthy." (S. App. 249.)

6. As noted *supra*, Guest's death sentence continued until January 2003, when then-Illinois Governor George Ryan issued an executive order of clemency, removing death from Guest's sentence. Guest's sentence was then commuted to a term of natural life in prison without the possibility of parole. *Guest*, 2004 US Dist. Lexis 4678.

REASONS FOR GRANTING THE PETITION

This Court should grant petitioner's writ because the Due Process Clause of the Constitution requires that a reviewing court determine, independent of actual bias, if the trial judge held an "interest in the outcome of" Petitioner's capital murder bench trial (*i.e.*, whether there was apparent bias) when the trial judge knew that he was under investigation as a prime subject for his long judicial history of corrupt leniency. In failing to consider apparent bias as an essential component of Guest's overall judicial bias claim, and looking exclusively at actual bias, the Seventh Circuit erred in applying an incorrect legal standard that is inconsistent with the precedent of this Court and the rulings of other Circuits and the Illinois Supreme Court.

Therefore, *certiorari* should be granted on this important question of federal law. *See* Rules 10(a) & (c) of the Supreme Court Rules; *See also Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (granting certiorari where the opinion of a United States Court of Appeals "appeared to be in conflict" with this Court's precedents); *Jones v. Flowers*, 547 U.S. 220 (2006) (granting *certiorari* to resolve a conflict among the Circuits and State Supreme Court regarding the Due Process Clause).

Fundamentally absent from the Seventh Circuit's decision was any consideration of whether there existed in Petitioner Guest's case "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, [and therefore] denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Moreover, the issue of petitioner's writ – the apparent bias of a trial judge presiding over a bench trial, for capital murder – strikes at the heart of the integrity and impartiality of our judicial system and the public's perception of it. The Court has long recognized that the right to an impartial trial judge is among the rights so fundamental that a finding of

judicial bias, even absent actual bias, requires reversal and a new trial. This constitutional principle is far too important to have Guest's judicial bias claim die because the reviewing court failed to find actual bias and separately failed to consider the appearance of bias. *See also Arizona v. Fulminante*, 499 U.S. 279, 290 (1991) (identifying judicial bias as a "structural defect" in the trial process).

ARGUMENT

I. The Panel's Erroneous Decision in *Guest* Reflects a Misapprehension of the *Bracy* "Actual Judicial Bias" Cases of the Seventh Circuit and the United States Supreme Court

The panel's decision in *Guest* arises directly from *Bracy v. Schomig ("Bracy II")*, 286 F.3d 406 (7th Cir. 2002), *cert. denied*, 537 U.S. 944 (2002). In *Bracy II*, the Seventh Circuit candidly acknowledged its collective and divided confusion as to how to decide bias cases involving judicial corruption, in light of this Court's decision in *Bracy*, 520 U.S. 899. *Bracy II*, 286 F.3d at 408, 410. (That Supreme Court decision reversed the Seventh Circuit's earlier decision in *Bracy v. Gramley*, 81 F.3d 684 (7th Cir. 1996), which denied the petitioner's request, as part of his habeas petition, for discovery to prove a judge's *actual bias*. *Bracy*, 520 U.S. at 909-910.) The issue before this Court was limited to whether the petitioner had made a sufficient showing to establish "'good cause,' as required by Habeas Corpus Rule 6(a), for discovery on his *claim of actual judicial bias*." *Id.* at 901 (emphasis added). This Court ruled that the petitioner had made the showing, and the case was remanded for further proceedings. *Bracy II*, 286 F.3d at 408.

In *Bracy* II, a highly divided Seventh Circuit decided the defendant's due process claim by applying this Court's ruling in a habeas matter concerning discovery in an actual bias case. *Id.* However, the *Guest* panel's reliance on *Bracy II* as virtually

the sole legal template to decide Guest's claim of judicial bias is misplaced for several reasons. As a result, an incorrect — and more stringent — legal standard was applied to Guest's due process claim.

First, the panel incorrectly treated Guest's claim of judicial bias as identical to that in *Bracy II*.[7] Although petitioners in both cases asserted due process violations based on actual bias by corrupt trial judges, Guest also argued that there was an appearance of bias. Specifically, he argued that Judge Pompey, his trial judge, had an interest in the outcome of his bench trial that denied him his due process right to a fair trial. Guest identified for the Seventh Circuit a toxic mix of influential factors that constituted a temptation that would lead the judge "not to hold the balance nice, clear and true" between the State and him. *Tumey*, 273 U.S. at 532. As he was presiding over Guest's death penalty case, in a bench trial and at sentencing, Judge Pompey understood that he was under investigation by the FBI for his extensive record of corruptly-induced leniency. At stake were his judicial post, salary and liberty. The panel apparently took no account of these factors and made no mention of them in its decision.[8]

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7. The panel overstates the similarity of the two cases and fails to acknowledge the critical due process argument of presumed bias that Guest asserted. "This case presents an argument almost identical to that in our decision in *Bracy*." *Guest*, 474 F.3d at 933.

8. Apart from disregarding Guest's "presumed bias" argument as an integral component of his judicial bias claim, the panel also misapprehended the actual bias claim that Guest made, and it apparently confused his with the actual bias claim in *Bracy II*. The panel mistakenly characterizes "[t]he gravamen of Guest's judicial bias claim" to be that Judge Pompey "sought to bolster his conviction statistics by exhibiting bias *against* the defendants in certain of his cases in which he had not accepted bribes." *Guest*, 474 F.3d at 931 (emphasis in original). Guest's actual bias claim was more limited; he argued that Judge Pompey had exhibited bias against only him in his case alone.

Instead, in *Bracy II*, the Seventh Circuit interpreted this Court's decision in *Bracy*, as creating a new standard for judicial bias cases that requires a petitioner to prove the higher threshold of actual bias without regard to appearance of bias. Unlike in *Guest*, however, there was no reported claim in *Bracy II* of a similarly toxic mix of temptations facing Judge Pompey, and no reported claim that the *Bracy II* trial judge had a disabling interest in the outcome of the defendant's particular case.

However, the *Bracy II* opinion also reflects the Seventh Circuit's confusion as to the correct standard to apply in such cases.[9] As the Circuit noted, "[o]ur opinions diverge over exactly what the Supreme Court meant when it said that Bracy and Collins must show 'that Maloney was actually biased in *petitioner's own case*.'" *Bracy II*, 286 F.3d at 410 (emphasis in original).

The plurality opinion in *Bracy II* nonetheless reached its decision after a review of black letter Supreme Court precedent: "[t]hese cases tell us that ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge." *Id.* However, the Seventh Circuit continued, "[b]ut because of the language in the Supreme Court case in *Bracy*, we will focus today on actual bias." *Id.* The court then engaged in rhetorical discussion and speculation about the correct standard to apply:

> Our only explanation is that the unique nature of this case may be why we need to look for actual bias. Maybe it is because the appearance of bias — or at least of criminality — is so obvious. It may be that we must be careful to tie our analysis to actual bias in the present case because Maloney was so obviously not concerned with justice in other cases. Whatever the reason, Bracy and Collins have the heavy burden of showing actual bias.

Bracy II, 286 F.3d at 411.

9. Only four of the eleven judges on the court joined the *en banc* decision in its entirety. *Bracy II*, 286 F.3d at 408.

The divisiveness and disagreement within the Circuit is also apparent from one opinion, joined by three other judges, concurring in part and dissenting in part.

> . . . I can find no actual holding in the [Supreme] Court's opinion in this case to the effect that *Tumey* and its progeny are inapposite and that actual bias invariably must be shown.[10] Yes, the Court granted the petitioners the right to discovery so that they might establish actual bias, but in confining the scope of the case to discovery, the Court declined to consider whether proof of actual bias is the only means to relief in a case of judicial corruption.

Bracy II, 286 F.3d at 436 (*citing Bracy*, 519 U.S. 1074 (1997) (J. Rovner, concurring in part and dissenting in part)).

As a result of the Seventh Circuit's misapprehension of the limits of the decision, the Seventh Circuit erred in *Bracy II* and compounded its error by restricting its review in *Guest* to actual bias. As this Court is aware, and as Judge Rovner's separate opinion makes clear, *Bracy* was limited to the specific discovery issue on petitioner's claim of *actual judicial bias*. *Bracy*, 520 U.S. at 901; *Bracy II*, 286 F.3d at 436. There simply is no support in *Bracy* for reviewing judicial bias claims only for actual bias in a case when appearance of bias also is asserted. Indeed, to do so would conflict with this Court's prior decisions and would disregard Guest's appearance of bias claim as a matter of both fact and law. The Seventh Circuit's limited review also deprived Guest of a full and fair consideration of the merits of his due process claim — a claim that strikes at the central premise of our judicial systems and that warrants a new trial.

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10. The excerpted opinion refers to Judge Posner's opinion in the decision, which in turn was joined by two other judges, concurring in part and dissenting in part. *Bracy II*, 286 F.3d at 419.

II. Judge Pompey's Disqualifying Interest in the Outcome of Guest's Death Penalty Case Deprived Petitioner of His Due Process Right to a Fair Trial

In his appeal to the Seventh Circuit, Guest argued that his due process right to a fair trial was violated as a result of the overriding interest that Judge Pompey held in the outcome of his trial. The interest arose because of his history of judicial corruption and because he knew he was a prime target of the investigation. As was later apparent, by the time of Guest's trial, Pompey recognized that the prospect of an indictment loomed large and threatened to jeopardize not only his criminal enterprise but also his judicial post, his livelihood and, even more important, his own liberty.

Guest's death penalty case presented Judge Pompey with an extraordinary opportunity. Because the Guest case would entail no bribe offers, Judge Pompey understood that he was well-positioned to administer some powerful advocacy on his own behalf. As Guest argued, Judge Pompey was primed to lodge a preemptive defense — to thwart the FBI's investigation — by demonstrating that he could come down hard on criminal defendants unlike any other time in his judicial career. Pompey could make the point emphatically by presiding over a bench trial, convicting Guest of capital murder and sentencing Guest to death — something he had never done before. And that is precisely what Pompey proceeded to do.

The temptation that Pompey confronted — and that any other judge under similar circumstances similarly would be expected to confront — is so compelling that bias is required to be presumed. Although such interest is intolerable in any judicial proceeding, its occurrence in a capital murder trial is especially toxic. Because of the "possible temptation" to Judge Pompey "not to hold the balance nice, clear, and true between the state and the accused . . . ," Guest was "denied the due process of law." *See Tumey*, 273 U.S. at 532.

III. The Panel's Opinion in this Case Conflicts with Longstanding Precedent of the United States Supreme Court

It is a bedrock principle of American jurisprudence that defendants — especially defendants facing death — are entitled under the Due Process Clause of the United States Constitution to a fair trial in a fair tribunal. *Bracy*, 520 U.S. 899; *Winthrow v. Larkin*, 421 U.S. 35 (1975); *Johnson v. Mississippi*, 403 U.S. 212 (1971); *In re Murchison*, 349 U.S. 133 (1955). The fundamental right to an impartial judge is rooted in the Due Process Clause, which guarantees that no judge is permitted to preside over a case in which he has an interest in the outcome. *Murchison*, 349 U.S. at 136. No person should be required to stand trial before a judge with a possible temptation to stray from his obligation to discharge his duties honestly and fairly. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). This Court has made emphatic that, at a minimum, due process "clearly requires 'a fair trial in a fair tribunal' before a judge with no actual bias against the defendant *or interest in the outcome of his particular case*." *Bracy*, 520 U.S. at 905 (emphasis added). As this Court has explained, "[O]ur system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way justice must satisfy the appearance of justice." *Murchison*, 349 U.S. at 136 (*citing Tumey*, 273 U.S. at 532; *Offutt*, 348 U.S. at 14).

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey, 273 U.S. at 532.

This Court also has made clear the premium that the Constitution places on a judge's impartiality. *See Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967); *Tumey*, 273 U.S. at 535 (recognizing that the right to an impartial judge is among

the "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). When the presiding judge is not impartial, however, there is a "structural defect[] in the constitution of the trial mechanism" that "defies analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 309, *Tumey*, 273 U.S. at 535 (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Relying on *Tumey*, this Court has made clear the high importance of judicial neutrality and the need to take remedial measures when appropriate:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

This Court has long held, in a variety of cases, that the appearance of judicial bias constitutes a violation of due process for which a new bias-free trial is warranted. *See, e.g.*, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (due process violation where state supreme court justice participated in a decision of an issue similar to that in separate lawsuit to which he was a party); *Ward*, 409 U.S. 57 (due process violation where judge doubling as mayor was empowered to impose fines used in part to pay mayoral salary); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (due process violation where judge presided over criminal contempt trial of individuals who had verbally attacked him); *Offutt*, 348 U.S. 11 (same); *Murchison*, 349 U.S. 133 (due process violation where judge presided over criminal contempt trials of same witnesses whom he had interviewed

while acting as a one-person grand jury); *Tumey*, 273 U.S. 510 (due process violation where judge doubled as mayor who could impose fines to raise town revenues and help pay his salary).

Nor is a due process violation based on the appearance of bias dependent on proof of actual bias. *Peters v. Kiff*, 407 U.S. 493, 502 (1972). In *Peters*, the Court held that although it would be difficult for a white defendant to prove actual harm from being indicted and tried by juries from which black jurors were excluded, the exclusion of jurors based on race denied the defendant his due process of law. The Court reasoned that the jury selection process failed to satisfy the appearance of impartiality, and the appearance of bias tainted the judicial process:

> [E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias. This rule, too, was well established long before the right to jury trial was made applicable in state trials, and does not depend on it. Thus it has been invoked in trials to a judge, *e.g. Tumey*, 273 U.S. 510; *Murchison*, 329 U.S. 133; *Mayberry*, 400 U.S. 455.

Id. at 502.

Establishing presumed, or apparent, bias and, thus, a due process violation does not turn on a showing of actual bias. The Seventh Circuit panel in *Guest* would appear to have it otherwise. Although such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14. This Court repeatedly has reaffirmed the principle that

consideration of judicial bias goes beyond any actual harm in a particular case, and "the risk of undermining the public's confidence in the judicial process" must be considered. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1987).

In limiting its inquiry to actual judicial bias, the Seventh Circuit denied Guest a full and fair due process claim. In addition, the Seventh Circuit opinion poses the risk that claims involving the "appearance of bias" will be rendered obsolete, or at least irrelevant, in direct contradiction of the rulings from a long line of this Court's cases. *See, e.g., Aetna*, 475 U.S. 813; *Ward*, 409 U.S. 57; *Murchison*, 349 U.S. 133; *Tumey*, 273 U.S. 510. At a minimum, the panel should have considered whether, in *Guest*, the combined circumstances of petitioner's case and the judge's untenable situation created "a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true." *See Tumey*, 273 U.S. at 532; *see also Ward*, 409 US at 60. This the *Guest* panel did not do.

IV. The *Guest* Panel's Decision Conflicts with the Law Of Other Circuits

Several rulings from other circuits highlight the *Guest* panel's departure from important legal principles of due process that have been implemented to safeguard the integrity of the judicial process. At the core of these decisions is the principle that the sanctity of the law, the integrity of the judicial system and the public's confidence must remain inviolate. A reviewing court's consideration of a petitioner's claim of apparent bias is critical to upholding that principle.

Most of the circuits consider the appearance of bias an important due process issue that merits careful attention and review. The Seventh Circuit itself has recognized in the past that the appearance of bias can violate the due process guarantee

of a fair trial. *See Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1375 (7th Cir. 1994) ("Disqualification is required only when the biasing influence . . . is so strong that we may presume actual bias"); *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997) (quoting *Del Vecchio*, 31 F.3d at 1380) ("[b]ut we noted in *Del Vecchio* an exception, well established in the Supreme Court's cases (*see, e.g.*, *Tumey*, 273 U.S. at 535), for 'a possible temptation so severe that we might presume an actual, substantial incentive to be biased'"); *see also Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir. 2005) (finding actual bias but recognizing that "the Supreme Court has decided that both actual bias and the appearance of bias violate due process principles"). Thus, the Seventh Circuit's refusal to consider the appearance of a bias claim in *Guest* appears to represent a departure from its own jurisprudence.

By contrast, the Third Circuit is generally dismissive of apparent bias claims. In the Third Circuit, the appearance of a trial judge's bias, without more, has been held not to violate the Due Process Clause. *Johnson v. Carroll*, 369 F.3d 253 (3d Cir. 2004). The Third Circuit's treatment of appearance of bias claims conflicts with that of other circuits — and of the Supreme Court. The Circuit has reached its position based on its interpretation that: (i) the Supreme Court never held that an appearance of bias violates due process (*Id.* at 259); (ii) the holdings of *Murchison* and certain of its progeny are limited to their facts; and (iii) the Court's discussion of the "basic requirements of due process" as part of a fair trial is only *dicta*. *Id.* at 260, quoting *Murchison*, 349 U.S. at 136. The Third Circuit also relied on the Seventh Circuit's decision in *Del Vecchio*, 31 F.3d 1363.

The Tenth Circuit has sent mixed messages in addressing appearance of bias claims. On the one hand, it has acknowledged the well-established legal principles of "prevent[ing] even the probability of unfairness" and of being mindful that charges of prejudice leveled at trial judges "should not be casually treated by a reviewing court." *Mitchell v. Maynard*, 80 F.3d 1433, 1450

(10th Cir. 1996) (citations omitted). In *Mitchell, the* court held that, where the judge had accepted and dismissed all prison cases in one fell swoop, and also had uttered "expressions of disapproval," it was appropriate to reassign the cases to prevent the "probability of unfairness or the appearance of impropriety." *Id.* at 1450.

On the other hand, more recently, in *Welch v. Sirmons*, 451 F.3d 675, 700-01 (10th Cir. 2006), the Tenth Circuit's principle of the "appearance of impropriety" appears to have sustained at least a setback, if not outright abandonment. In reviewing a habeas petition, the *Welch* court denied the criminal defendant's claim that an appearance of bias existed because the judge's son was the lead detective on the case. *Id.* at 698-701. As the *Guest* panel did in the instant case, the Tenth Circuit failed to find *actual* bias and declined to find a due process violation. No consideration was taken of the trial court's appearance of bias, based on the judge's interest in the outcome of the defendant's trial. In declining to consider whether there was an appearance of bias, the Tenth Circuit specifically referred to the Third Circuit's ruling in *Johnson v. Carroll. Id.*

Other circuits have exhibited more uniformity in their respect for the risk that an appearance of judicial bias poses to a defendant's right to due process and the judicial system as a whole. The Fourth Circuit has held that a perception about the impaired integrity of the law and judicial system could result from a judge's apparent bias, even when it is not directed at the defendant. *United States v. Mikalajunas*, 1992 U.S. App. Lexis 21054 (4th Cir. 1992). As the Fourth Circuit noted, citing *Liljeberg*, 486 U.S. at 864.

> [t]h[e] appearance of propriety is as important to public confidence in our judicial system as actual fairness. 'To perform its high function in the best way, justice must satisfy the appearance of justice.'

> This is especially so in criminal cases where the government seeks to deprive a person of liberty or property.

Mikalajunas, 1992 U.S. App. Lexis 21054, *11.[11]

In *Mikalajunas*, the Fourth Circuit determined that the sentencing judge was presumed biased, and it reassigned the case to a different judge for re-sentencing. The court's determination was based on the judge's strong criticism of the Circuit for vacating the original sentence while the judge, on remand, imposed the identical sentence, even though it was lawful the second time it was imposed. The Fourth Circuit identified its dual concerns: that the trial judge's comments called the integrity of the judiciary into question and that the perception of the court's compromised integrity could not be cured. "The error was one affecting public perception, and despite the lawful sentence, the perception still remained one of judicial disregard for the law." *Id.*

In *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995), the Fifth Circuit stressed the importance of the appearance of

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11. While the instant case does not directly implicate 28 U.S.C. § 455(a), such statutory cases are instructive in the current case because the text of § 455 and the considerations in a due process violation are based on similar concerns. *See Exxon Corp. v. Heinze*, 32 F.3d 1399 (9th Cir. 1993) ("We agree that 'the Due Process Clause entitles a person to an impartial and disinterested tribunal' and that like the more stringent federal judge's disqualification statute, 28 U.S.C. § 455, the Constitution is concerned not only with actual bias but also with 'the appearance of justice.'"); *Lyell v. Renico*, 470 F.3d 1177 (6th Cir. 2006) ("[T]his court has relied on the [Supreme Court] decision [addressing the statutory recusal standards under § 455] in assessing judicial bias claims under the Due Process Clause.") (internal citations omitted). In interpreting section 455, this Court noted "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."); *Liljeberg*, 486 U.S. at 865 (*citing* S. Rep. No. 930-419, at 5; H.R. Rep. No. 93-1453 at 5).

impropriety and identified essential questions: (i) "how [do] things appear" to a reasonable person; and (ii) whether a person familiar with the facts would harbor doubts about the impartiality of the tribunal. *Id.* at 156-7. In *Jordan*, the Fifth Circuit held that where the defendant had been involved in an extremely hostile relationship with a person having a long and close friendship with the judge, a reasonable person would question the impartiality of the district judge and her fitness to preside in a case where the defendant's liberty was at stake. *Id.* at 157-158. *See also United States v. Feldman*, 983 F.2d 144 (9th Cir. 1992) (affirming judgment in case under 28 U.S.C. § 455(a), on judge's *sua sponte* partial recusal where judge owned shares in entity that merged with party in case before him; full recusal was warranted, however, to avoid the appearance of bias). Like the judge's interest in *Jordan*, Judge Pompey held an impermissible interest in the outcome of *Guest*'s capital murder case, in which his judicial post, salary and liberty were at risk. The interests of both judges constituted an appearance of bias that should have disqualified them.

In *Bobo v. United States*, 185 Fed. Appx. 885 (11th Cir. 2006), the Eleventh Circuit reviewed a claim of apparent bias and reaffirmed the importance of ensuring the public's confidence in the impartiality of the trial court. The government in *Bobo* had alleged that the trial judge was biased against the prosecution in one case, primarily on the judge's actions in another criminal trial involving the defendant's alleged co-conspirators. *Id.* at 888. The Eleventh Circuit declined to find actual bias, but held that certain conduct by the judge in the "intertwined" case might "give rise to the appearance of . . . a lack of impartiality in the mind of a reasonable member of the public." *Id.* The court underscored the importance of the "appearance of neutrality" and "the interest of eliminating any doubt of judicial fairness," and it remanded the case for reassignment. *Id.* Thus, unlike in *Guest*, even where courts have declined to find actual bias, they have considered the trial judge's conduct for an appearance of bias and imposed remedial

measures to safeguard confidence in the impartiality of the judicial system.

In *In re Boston's Children First*, the First Circuit credited the importance of an objective outsider's perception in apparent bias cases. The court held in that case that the question of a judge's actual impartiality is irrelevant when a reasonable person "might perceive bias to exist." *Id.*, 244 F.3d 164, 177 (1st Cir. 2001). In *Boston's Children First*, the trial judge made comments to the press about the facts of a pending motion. *Id.* at 166. The First Circuit reversed and held that the trial judge's denial of a Section 455(a) recusal motion based on his comments was an abuse of discretion. *Id.* at 164. While emphasizing that its "ruling in no way intimate[d] any actual bias or prejudice on the part of the" trial judge, the First Circuit held that the circumstances suggested that a reasonable person might perceive that such bias existed. *Id.* at 171. The appearance of partiality stems from the "real possibility that the judge's statements may be misinterpreted because of the ambiguity of those statements." *Id.* at 170. Like *Boston's Children First*, in *Guest*, the court declined to find actual bias, but in both cases the issue of the judge's appearance of bias instills in an objective outsider serious doubt about the neutrality of the trial court. The concern is heightened in *Guest*, when the appearance arose in what was a death penalty case at the time.

In examining claims of judicial bias, the Second Circuit noted that "[t]he Supreme Court and Courts of Appeals, including this Court, have emphasized repeatedly that not only must justice be done, it also must appear to be done. In the oft-quoted statement of Justice Frankfurter, 'justice must satisfy the appearance of justice.'" *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989) (quoting *Offutt*, 348 U.S. at 14). In *Edwardo-Franco*, the Second Circuit vacated the judgment of four defendants and remanded their case for retrial based on the cumulative effect of several separate factors. These included: (i) questionable rulings (*e.g.*, inadequate inquiry into non-English speaking defendant's waiver of counsel);

(ii) disparaging comments that the judge made at sentencing about the nationality and immigrant status of two defendants; and (iii) the unlawful sentence of 30 years' imprisonment followed by a lifetime term of supervised release that the judge imposed. *Id.* at 1006. *See also American Cyanamid Co. v. Federal Trade Com.*, 363 F.2d 757, 767 (6th Cir. 2001) ("[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided and [w]herever there may be reasonable suspicion of unfairness it is best to disqualify"); *Harris v. Missouri*, 960 F.2d 738, 740 (8th Cir. 1992) (noting that the defendant "failed to show either actual or presumed bias by the trial judge").

Because of the dispute among the Circuits and the different treatment accorded to the appearance of bias in due process claims, the Court should seek to resolve this fundamental and structural issue and grant *certiorari* here.

V. The Seventh Circuit Panel's Decision in *Guest* Conflicts with the Illinois Supreme Court's Decision in a Similar Judicial Bias Case

On a claim of judicial appearance of bias similar to Guest's, the Illinois Supreme Court vacated the judgment and ordered a new trial. *People v. Hawkins*, 181 Ill.2d 41 (Ill. 1998). Like Guest, the defendants in *Hawkins* asserted that they were victims of a corrupt trial judge's compensatory bias as part of the judge's attempt to offset his dubious record of acquittals and dismissals and to thwart their scrutiny. *Id.* at 51-52. In addition, like Judge Pompey in Guest's case, the *Hawkins* trial judge correctly suspected that he was being investigated by the FBI. *Id.* at 52. (The judge in *Hawkins* even returned the bribe because of his concern. *Id.*)

In *Hawkins*, unlike in *Guest*, however, the Illinois Supreme Court considered and applied the Supreme Court's established law on appearance of bias. The Illinois court made clear that "[b]ecause our inquiry is limited to whether [the trial judge] could have been tempted not to hold the balance between the

parties 'nice, clear and true' *defendants need not show actual bias* by the trier of fact in order to be granted a new trial." *Id.* at 51, *citing Aetna*, 475 U.S. at 822; *Ward*, 409 U.S. at 60; *Tumey*, 273 U.S. at 532. (Emphasis added). In stark contrast, the Seventh Circuit in *Guest* failed to inquire about any temptation to Judge Pompey not to be impartial. Moreover, far from determining that Guest "need not show actual bias," the Seventh Circuit in the instant case focused exclusively on actual bias and rejected Guest's due process claim because it failed to find actual bias. *Guest*, 474 F.3d at 932.

The Illinois Supreme Court took clear note of this Court's ruling in *In re Murchison* and its proposition that "due process will sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Hawkins*, 181 Ill.2d at 51 (*quoting Murchison*, 349 U.S. at 136). Accordingly, the Illinois Supreme Court found that the trial judge in *Hawkins* had an interest in the outcome of the case because the judge "wanted to insure that he did not lose his judicial post and salary as a result of a criminal indictment, and therefore was motivated to return a verdict that would not spark the suspicions of authorities." *Hawkins*, 181 Ill.2d at 51-52. Guest possessed these identical interests, which the Illinois Supreme Court credited in *Hawkins*. Guest asserted these same interests to the Seventh Circuit in his appeal, to no avail. No mention of them was even made in the panel's decision. Contrary to the ruling in *Guest*, the Illinois Supreme Court in *Hawkins* held that these same judicial interests entitled the defendants to a new trial because their due process rights to a fair trial in a fair tribunal had been violated. *Hawkins*, 181 Ill.2d at 52.

Because *Guest* conflicts with *Hawkins* on similar claims of two trial judges' appearance of bias (while both judges correctly suspected they were under investigation for judicial corruption), and because Guest would have been awarded a new trial under *Hawkins* had the Illinois Supreme Court reviewed his claim instead, the Court should grant Guest's petition for *certiorari*.

CONCLUSION

For the foregoing reasons, petitioner Anthony Guest respectfully requests that this Court grant review of this matter.

Respectfully submitted,

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